IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

Date: Signature: _____

CASE NO: 28165/2020

In the matter between:

enX CORPORATION LIMITED t/a EQSTRA FLEET MANAGEMENT	Plaintiff

and

TNJ PROJECT SOLUTIONS (PTY) LIMITED	First Defendant
NTHABISENG EUDORA MOKOENA	Second Defendant

Coram: Ternent AJ

Heard on: 7 November 2022

Digitally submitted by uploading on Caselines and emailing to the parties

Delivered: 13 January 2022

JUDGMENT

TERNENT, AJ:

[1] This is an application for summary judgment brought by the plaintiff, enX, against the second defendant, Mokoena. At the outset, the applicant's counsel informed the Court that it was not pursuing summary judgment against the first defendant, TNJ, because it had been placed in business rescue, subsequent the application for summary judgment.

[2] The plaintiff brings this application in the face of its summons, issued on 29 September 2020, against the defendants. Its claim against the second defendant, Mokoena, is based on undisputed suretyship obligations assumed by her should TNJ be unable to pay its indebtedness to enX.

[3] The particulars of claim reflects that the alleged indebtedness arises from a suite of agreements, all of which are common cause. Mokoena affirms that she was the sole director of enX and it is clear from the agreements that she concluded them and signed them on its behalf. The agreements primarily pertain to the rental of twenty-five vehicles by TNJ from enX. These agreements include four agreements concluded on 26 June 2018 and one concluded on 12 April 2019 namely:

3.1 a Master Framework Agreement;

3.2 a Full Maintenance Rental – Product Master Agreement in terms of which enX let and TNJ hired the vehicles specified in sales orders which are attached to the particulars of claim;

3.3 a GPS Tracking – Product Master Agreement which involved the lease of GPS units which were fitted to the vehicles;

3.4 a Fuel Card – Product Master Agreement which involved the supply of a fuel card facility; and

3.5 a Vehicle Rental Services Agreement – Product Master

Agreement.

In a nutshell enX let and hired twenty-five vehicles under the Full Maintenance Rental Agreement and supplied services under the GPS and Fuel Card Agreements in respect of the vehicles.

[4] It is common cause that subsequent the bringing of the summary judgment application, further amounts were paid by TNJ in liquidation of its indebtedness, i.e. an amount of R300 000,00 which was paid in instalments on 15 October 2020, 16 November 2020 and 8 February 2021 and a further payment of R133 787,24. As a consequence thereof, the applicant's counsel subsequent the hearing forwarded an amended draft order to me and amended certificates of balance, dated 25 October 2022, which took into account the payments made and amended certain of the claims in respect of which judgment is sought.

[5] As provided in the agreements, and as referred to below, enX was entitled to issue certificates of balance which were agreed to be *prima facie* proof of enX's indebtedness.

[6] The claims comprise:

UNDER THE MASTER FRAMEWORK AGREEMENT

6.1 arrear rentals in an amount of R757 034,19;

6.2 traffic fines and maintenance to the vehicles in the amount of R52 800,36;

6.3 it being common cause that the vehicles had been returned to enX, the reasonable cost to remedy defects to the vehicles in

amount of R188 691,38;

6.4 a claim arising from the early termination of the agreements calculated on the pro rata excess kilometres driven in the vehicles which exceeded the actual kilometre readings of the returned vehicles at the termination date. This is a sum of R3 029,18; and

6.5 a contractual termination fee in the amount of R2 612 077,36 which is claimed and calculated as 60% of the rentals not yet due based on the early termination of this agreement. This claim is effectively a penalty which arises due to the breach and termination of the agreement.

UNDER THE GPS AGREEMENT

6.6 arrear subscription fees are claimed in the amount of R19 165,05;

6.7 a penalty equating to 60% of the rentals not yet due but arising because of the early termination in the amount of R95 904,48.

6.8 a claim for fuel purchases which had been incurred in the amount of R15 030,04.

UNDER THE VEHICLE RENTAL AGREEMENT

6.9 a claim for arrear rentals in the amount of R134 030,94.

6.10 as provided for in the agreements, interest was to accrue on the indebtedness at the prime interest rate published by the South African Reserve Bank plus 2% from due date to date of

final payment; and

6.11 Costs on the attorney client scale.

[7] It is immediately apparent on reading the plea filed on behalf of the defendants, that it constitutes a bare denial. There are no factual averments made nor are there any specific defences pleaded. Insofar as Mokoena is concerned, the suretyship obligations are not disputed but it is averred that, in terms of the provisions of section15(2)(h) of the Matrimonial Property 88 of 1984, Mokoena's spouse did not consent in writing to the signing of any suretyships. As appears below this allegation does not pass muster.

[8] As a consequence, the plea baldly disputes that the agreements were breached and validly cancelled and puts the plaintiff to the proof of its contractual claims. As submitted by the applicant's counsel, these denials are made despite the common cause fact that the vehicles were returned to enX prior to the institution of these proceedings, and the further payments made in liquidation of the indebtedness.

[9] Consequent on receipt of the plea, enX brought the application for summary judgment - its primary submission that the defence/s, to the extent that they are pleaded, primarily being bare denials, do not raise a triable issue. Pertinently then this Court must find that the bare denials do not disclose a *bona fide* defence to the plaintiff's claims and, in the circumstances, summary judgment is appropriate.

[10] Other than the alleged defence to the suretyship alluded to above, all of the remaining submissions that were made to me by Mokoena's attorney arose from his heads of argument and were not specifically pleaded. In so doing, it appeared to the Court that he made a valiant attempt to find a defence on the merits but it was plainly clear that the plea had simply been filed to delay the plaintiff of its remedy, save in one instance.

[11] In summary judgment proceedings a defendant must set out fully the nature and grounds of her defence to enable this Court to establish whether the defence is *bona fide* and good in law. It is regarded as sufficient if she swears to a defence valid in law in a manner which is not inherently or seriously unconvincing.[1]

[12] It is apparent from the plea and the opposing affidavit that Mokoena has dismally failed to place any facts before the Court. The bald, vague and sketchy denials do not disclose any *bona fides* or a defence at all.

[13] The well-known decision of ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture***[2] provides authority for the following:

> *"[31] So too in South Africa, the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.*
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> *[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. …*
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> *[33] Having regard to its purpose and its proper application,*

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1 ***Breytenbach v Fiat SA (Edms) Bpk*** 1976 (2) SA 226 (T)

2 2009 (5) SA 1 (SCA)

summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G-426E."

[14] With those legal principles holding sway, I will now deal with the submissions that were made by Mokoena's attorney.

[15] The first submission related to the provisions of sections 154(1) and (2) of the Companies Act 71 of 2008. Mokoena's attorney informed me that he had only recently learnt that TNJ had been placed into business rescue and he had made contact with the business rescue practitioner on 3 November 2022 and wondered if she had any interest in the matter. He affirmed that there was no postponement application before me nor had the business rescue practitioner approached this Court or instructed him to seek a postponement. That said, he sought to unconvincingly refer to section 154 of the Companies Act vaguely alleging that if the debts were discharged under business rescue then there would be no claim against the surety, Mokoena.

[16] Applicant's counsel referred me to the decision of ***Van Zyl v Auto Commodities (Pty) Ltd***.[3] This decision provides clear authority that in the face of a business rescue plan being implemented, the surety's liability for any debts to the creditor are not extinguished. All section 152 provides is personal protection for the company in business rescue against the enforcement of the debt prohibiting the creditor from pursuing claims against it. In alluding to section 154, Mokoena's attorney did not specifically make reference to section 154(1) or (2) in his argument. It was clear to me that this point held no water, there being a dearth of factual information let alone a defence raised in the plea. As

[3] 2021 (5) SA 171 (SCA)

such this point falls to be dismissed.

[17] The second point pertained to the certificates of balance which were tendered into evidence by enX. Although no submissions were made to me in this regard, it is apparent from the opposing affidavit that Mokoena takes issue with the certificates of balance on the basis that the calculation of the amounts due has not been disclosed. This she does without making any factual submissions as to why the amounts are incorrect making no reference to the twenty-four sales orders (confirmation of rental forms) attached to the particulars of claim and in complete disregard of the contractual terms and evidential value provided by the certificates of balance which place an onus on her to demonstrate that they are incorrect. She palpably failed to do so. As such this point has no merit.

[18] Rather, Mokoena's attorney focussed on the claim for repairs to the motor vehicles which he submitted is a damages claim which the relevant certificate of balance cannot magically make liquid. In this regard he argued that there were no details of the repairs which were effected to the vehicles, which had been repossessed and assessed for damages, and as such this claim could not be sustained in summary judgment proceedings.

[19] Clause 6.9 of the Master Framework Agreement provides as follows:

> *"6.9 A certificate under the hand of any director, executive officer or other authorised financial or legal manager of EFM (whose appointment or authority as such it shall not be necessary to prove) as to the existence and amount of the indebtedness of the customer to EFM, at any time as to the fact that such amount is due and payable, the amount of interest accrued thereon and the rate of interest applicable thereto shall be:*

6.9.1 prima facie proof of its contents and of their correctness for all purposes;

6.9.2 valid as a liquid document for purposes of any summary judgment or other proceedings instituted against the customer by EFM;

6.9.3 deemed to be sufficiently particular for the purposes of pleading or trial in any action or other proceedings instituted by EFM against the customer, unless the contrary is proven."

[20] In the General Deed of Suretyship and Indemnity dated 12 June 2018 and in respect of which Mokoena bound herself jointly and severally as surety and co-principal debtor together with TNJ to enX she agreed:

"13. We acknowledge and agree that a certificate signed by any manager (whose status need not be proved) of EQSTRA for the time being setting out the amount of our indebtedness hereunder shall be sufficient and satisfactory evidence and shall constitute prima facie proof per se of the amount of our indebtedness to EQSTRA."

[21] That in and of itself does not mean that the certificate establishes liability particularly in a claim which is clearly a damages claim.

[22] Clause 13.4 of the Full Maintenance Rental agreement provides :

"*EFM or its representative, together with the Customer Agent, shall inspect each Vehicle immediately upon return and complete a written Termination report forthwith. EFM however reserves the right to compile an additional written Vehicle Condition report within 48 (forty eight) hours after such return in which any additional defects not identified in the*

Termination Report may be listed. Any costs to rectify the defects identified in either report, fair wear and tear excepted in terms of clause 13.5, will be payable by the Customer on demand. Any dispute with regard to the additional Vehicle Condition Report shall be dealt with in accordance with clause 4.7."

[23] Clause 13.5 sets out what damages are excluded from fair wear and tear such as scrapes, damage to the paint work, and damage to the interior furnishings as an example.

[24] To my mind, the plaintiff would need to do more to establish the extent and nature of the repairs and whether those repairs are reasonable. Although there is a method to identify the repairs the quantification thereof is not liquid. As such an expert would need to be called in order to establish the quantum of the agreed repairs. There is no indication that TNJ and/or Mokoena agreed to a method to agree the quantification of the damages. As a consequence, I am of the view that this claim is illiquid and, as such, summary judgment is inappropriate.

[25] The third point which was raised related to the early termination penalties and/or compensation claimed by enX under the Full Maintenance Rental Agreement in the amount of R2 612 077,36 and the GPS Tracking Agreement in the amount of R95 904,48.

[26] The Master Framework Agreement makes express provision for the payment of early termination penalties should there be a breach and provides that the termination of the Master Framework Agreement will result in the termination of all of the remaining agreements which are still in force. Clause 3.3 provides:

"3.3 Should this MFA be terminated whilst one or more PMA(s) is/are still in force, all such early termination penalties and other termination provisions applicable under the relevant

PMA(s) shall become payable and/or applicable."

[27] Clause 12 of the Full Maintenance Rental Agreement makes provision for, in the event of an early termination, for payment on demand to enX:

"12.2.2 A compensation fee equal to the percentage stipulated in the CTA of the rentals not yet due in respect of the specific sales order; and

12.2.3 A pro rata excess kilometre charge calculated in terms of clause 3.3.3 where the actual kilometre reading at termination is in excess of a pro rata kilometre figure at date of such early termination."

[28] As provided in the Commercial Terms annexure *"60% of outstanding rentals may be claimed*".

[29] In clause 15.2 of the GPS Agreement it similarly provides in the event of early termination that the customer will return the GPS unit and shall, on demand, pay to EFM:

"15.2.2 a compensation fee equal as per the CTA"

[30] The Commercial Terms schedule again provides that in the event of early termination 60% of the rentals not yet due may be claimed.

[31] The Court was referred, by Mokoena's attorney, to section 1 of the Conventional Penalties Act 15 of 1962 which permits contractual penalties. He submitted that to permit enX this penalty would be excessive, and it had a duty to reduce the claim when the damages were not suffered i.e. to mitigate their claim.

[32] I was referred to the decision of ***Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd***.[4] In my view this case is distinguishable. There was no reliance on a certificate of balance or contractual terms which expressly provided for the payment of early termination penalties at a fixed amount of 60% of the value of the outstanding rentals, an agreed method and an easily quantifiable arithmetic exercise. The damages claims in the ***Renico Construction*** matter were patently unliquidated being as they related to a failed roofing contract.

[33] I was also referred to the decision of ***Adapt It (Pty) Ltd v Landis and Gyr (Pty) Ltd***[5] where Basson J referred to and relied upon the ***Renico Construction*** decision and rejected the damages claim in summary judgment proceedings flowing from the early termination of the contract for services.

[34] Although the ***Renico*** decision was applied in **Adapt it**, I am of the view that it is unhelpful here. Counsel there conceded that the damages claims flowing from the early termination of the contact for services was not liquid. There was no reliance on a certificate of balance or contractual terms which expressly provided for the payment of early termination penalties as stated above.

[35] Subsequent the hearing and with the consent of Mokoena's' attorney the applicant's counsel availed me of a further decision, ***Citibank NA, South Africa Branch v Paul NO and Another***.[6] In this case the Court was similarly seized with a summary judgment application. Here, certificates of balance were proffered, as provided for in the agreements, to support the liquidity of the claims. The defendants also argued that the penalty clauses in the termination agreement which also made

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4 2015 (2) SA 89 GJ

5 2021 JDR 1295 GP

6 2003 (4) SA 180 (T)

provision for the payment of instalments and rentals for the unexpired term of the agreement were excessive penalties and that the Court should exercise its discretion by reducing these amounts. The court found that in the absence of evidence as to the amounts which were reasonable, the Court could not exercise its discretion to reduce any penalty provisions which had been contractually agreed.

[36] I am of the view that given the paucity of a defence in the plea and/or any elaboration thereon in the opposing affidavit, the Court cannot equally exercise its discretion, and must find that the contractual provisions apply.

[37] Insofar as the conclusion of Mokoena's suretyship is concerned, the point relating to section 15(2) of the Matrimonial Property Act, and the lack of consent was raised. It is clear that it does not suffice to baldly aver that a spouse in a community of property marriage did not consent to the execution of the suretyship. As set out in ***Strydom v Engen Petroleum Ltd***[7] more is required.

[38] In her affidavit opposing summary judgment, Mokoena confirms that she is married in community of property. She does not however state that in concluding the suretyship she did not do so in the ordinary course of her business. In fact, I hold the view that she was precluded from doing so given that she was the sole director of TNJ. As such, no *prima facie* defence has been set up by Mokoena which would vitiate her suretyship obligations.

[39] Finally, Mokoena's attorney argued that although it was not disputed that the National Credit Act 34 of 2005 ("NCA") did not apply in respect of TNJ, Mokoena was not a juristic person and, accordingly, section 4 of the NCA applied as the suretyship agreement is a credit transaction and without compliance with the NCA's provisions, judgment could not be

[7] 2013 (2) SA 187 (SCA)

entertained.

[40] The applicant's counsel countered this and submitted that the NCA does not apply to TNJ and equally does not apply to Mokoena, the surety, because the suretyship constitutes a guarantee. I was referred to a case, ***Structured Mezzanine Investments (Pty) Ltd v Bestvest 153 (Pty) Ltd and Three Others***[8] in which Gamble J pertinently dealt with the applicability of the NCA to suretyships. The crisp point was whether or not *"an accessorial obligation under a suretyship* [can] *be subject to the NCA when the principal obligation under the main agreement is not"*. As in this matter, it was common cause that the company, here TNJ, was a juristic person whose annual turnover or asset value at the time of the conclusion of the suite of agreements exceeded R1 million. Further, it was accepted that the suite of agreements constituted a *"large agreement"* as contemplated in section 4(1)(b) of the NCA.

[41] Gamble J referred to the decision of ***Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another***[9]. Satchwell J found that *"(1) a surety whose liability arises from a contract of suretyship signing as a surety and co-principal debtor remains a surety; (2) the surety was sued as a guarantor i.e. based on the suretyship agreement of the obligations of the principal debtor in terms of a credit transaction to which the NCA did not apply"*.

[42] Gamble J cited a further matter, ***Structured Mezzanine Investments v Dawids and Others***[10] in which Judge Yekiso J approached the issue in regard to the applicability of the NCA as follows:

> *"[15] The respondents, by virtue of the suretyship agreements signed by each of them, are guarantors to the loan granted to*

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[8] A decision of the Western Cape High Court, Cape Town, Case No. 22698/2009

[9] 2009 (3) SA 384 (T) at paragraph 21, page 390

[10] 2010 (6) SA 622 (WCC) at page 628

Zapton by the applicant. Since the provisions of the National Credit Act do not apply to the principal debtor, Zapton, equally, such provisions do not apply to the respondents, as guarantors, by virtue of the provisions of section 4(2)(c) of the National Credit Act which provides:

'(c) the Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.'

[16] The surety agreements signed by each of the respondents constitute a credit guarantee as contemplated in section 8(5) of the National Credit Act which provides:

'(5) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy on demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.'

Thus, since the provisions of the National Credit Act do not apply to the principal debtor, Zapton, such provisions equally do not apply to the respondents. This is so because the principal debtor, in the instance of this matter, being a juristic person as contemplated in the definition of the term 'juristic person' in section 1 and the loan agreement in question being a large loan agreement as contemplated in section 9(4) of the National Credit Act."

[43] As a consequence, there is no merit in the argument that the NCA

applies in respect of Mokoena, the surety.

[44] As also raised by the applicant's counsel, it is trite that a defendant in summary judgment applications is required to fully disclose the nature and grounds of its defence and the material facts relied upon. In ***Breytenbach v Fiat SA (Edms) Bpk***[11] it was made clear that a defendant cannot approach the Court with a bald, vague and sketchy defence. As set out in ***Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd***[12] by Machaba AJ, the amended summary judgment rules require a plaintiff to wait for the plea to be delivered before it can launch its summary judgment application. In so doing, the plaintiff is now required to explain why no *bona fide* defence has been raised and, as highlighted in the judgment, the plaintiff can only do that when it is alerted to those defences in the plea.

[45] As set out in ***Jovan Projects***:

> *"[67] It follows practice logic that the defendant may not, in his or her affidavit resisting the plaintiff's summary judgment application, raise defences that have not been pleaded save for those that appear normally in this application. In the words of Van Loggerenberg:*
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> *the nature and grounds of the defence and the material facts relied upon therefore in the affidavit should be in harmony with the allegations in the plea. In this regard the plea should comply with the provisions of rules 18(4) and 22(2). (Sic)*
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> *[68] This is trite legal proposition that precludes a party to litigation from ambushing the other party with selective pleading at every turn. The defendant has an obligation to set out his or*

[11] 1976 2 (SA) 226 (T) at 229F-H

[12] 2022 JDR 0051 (JG)

her case fully and with clarity. The defendant is therefore called upon to file a plea that sets out its defence and, in the summary judgment application, to amplify the defence on an affidavit to illustrate a bona fide defence to the action. In setting out the defence on his or her affidavit, the defendant will not be restricted to the facta probanda of the case but will be ***entitled and expected*** *to set out relevant facta probantia."*

[46] The approach which was adopted by Machaba AJ, in the interests of justice, is one I have adopted here. Despite the fact that the defences raised were not properly raised in the plea and the plaintiff does not have a right of reply in these proceedings, I have considered these various defences and, save for one, I have found them to be without merit.

[47] Insofar as costs are concerned, costs should follow the result. The scale of costs is agreed by Mokoena in the suretyship agreement. Clause 17 allows for legal costs to be recovered on the scale as between attorney and client.

[48] Accordingly, I make an order in the following terms:

ORDER

48.1 Summary judgment is granted against the second defendant for payment of:

In terms of the FMR Agreement:

48.1.1 arrear rentals in the amount of R757 034,19;

48.1.2 traffic fines and maintenance in the amount of

R52 800,36;

48.1.3 pro rata excess kilometres costs in the amount of R3 029,18;

48.1.4 a contractual termination fee in the amount of R2 612 077,36.

In terms of the GPS Agreement:

48.1.5 arrear subscription fees in the amount of R19 165,05;

48.1.6 a contractual termination fee in the amount of R95 904,48.

In terms of the Fuel Agreement:

48.1.7 fuel purchases in the amount of R15 030,04.

In terms of the Vehicle Rental Agreement:

48.1.8 arrear rentals in the amount of R134 030,94.

48.2 Interest on each of the amounts at prime interest rate as published by the South African Reserve Bank plus 2% (two percent), from due date to date of final payment.

48.3 Costs of suit on the attorney client scale.

48.4 Insofar as the remaining claim for reasonable costs to remedy defects to the vehicles in the amount of R188 691,38 leave to

defend is granted to the second defendant, costs to be in the cause.

P V TERNENT
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Appearances:

For the Plaintiff:	Adv M Nieuwoudt E-mail: nieuwoudt@counsel.co.za
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